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No. 814

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

MILTON J. SHAPP,

Appellant,

against

UNITED STATES OF AMERICA, et al.,

Appellees.

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR MILTON J. SHAPP

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November 30, 1966.

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BRIEF FOR MILTON J. SHAPP

Opinions Below

The opinions of the District Court are not yet reported. Copies of the opinions are attached as Appendix A to the jurisdictional statement heretofore filed in No. 642, Baltimore and Ohio Railroad Company, et al. against United States of America. The reports of the Interstate Commerce Commission are reported at 327 I.C.C. 475 and 328 I.C.C. 304.

Jurisdiction

This proceeding was brought in a three-judge federal district court under 28 U.S.C. 1336, 2284, 2321-2325, to set aside orders of the Interstate Commerce Commission and for an interlocutory injunction pendent lite.

The judgment of the district court denying an interlocutory injunction was entered on October 4, 1966.

Milton J. Shapp filed notice of appeal on October 28, 1966. This Court on October 18, 1966 granted the application of Milton J. Shapp and others for a stay of enforcement of the order of the Interstate Commerce Commission authorizing the merger of New York Central Railroad Company (NYC) and Pennsylvania Railroad Company (PRR) pending determination of appeals from the decision of the three-judge district court.

Jurisdiction of this court is invoked under 28 U.S.C. 1253 and 2101(b).

Questions Presented

The merger of PRR and NYC would amalgamate $6 billion in assets and would constitute the largest corporate merger in the history of the United States.

The Interstate Commerce Act provides that the Commission shall approve railroad unifications, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, if the proposed transaction will be consistent with the public interest. Four criteria, among others, are specified in Section 5(2)(c) of the Act. (49 U.S.C. Section 5(2)(c)) The policies of the antitrust laws are also to be considered. The Commission's guide to the public interest is the National Transportation Policy together with subsequent legislation affecting transportation. *McLean Trucking Co.* v. *United States,* 321 U.S. 87 (1944)

The denial of an interlocutory injunction by the District Court presents the following questions:

1. Is it an abuse of discretion to deny an interlocutory injunction to maintain the status quo when serious and difficult questions of law and mixed questions of law and fact remain to be resolved about contested administrative action, and the contemplated action involves tremendous changes having a grave impact upon the parties, upon in-

numerable local communities, upon many States and upon the very Nation itself?

2. Do not the following illustrative points present serious questions upon which appellant reasonably may prevail on final hearing, and which also appear to have been so clearly erroneously decided by the Commission as to require that its orders be set aside or remanded to the Commission without further proceedings in the district court?

(a) the economic projections utilized by the Commission were unsound and have been shown to be erroneous by actualities;

(b) in lieu of using the current applicable standards for approval of the merger, the Commission used a superseded statutory formula plus a vague public benefits test;

(c) the anti-competitive consequences of the proposed merger were neither properly analyzed nor properly evaluated by the Commission;

(d) a full hearing on inclusion of the New Haven Railroad, traffic conditions of the merger, consolidation with other proceedings and the right of judicial review are important matters precedent to any final ruling on the validity of the merger.

3. Can an aggrieved individual, properly a party by legislative sanction as a citizen and shareholder, rely on irreparable harm to shareholders as a class and as a citizen of a State so as to justify the grant of an interlocutory injunction?

Statutes Involved

The National Transportation Policy (49 U.S.C. preceding Sections 1, 301, 901, and 1001), Sections 5(2) and 5a of the Interstate Commerce Act (49 U.S.C. 5(2) and

5b), and Sections 7, 8, and 10 of the Administrative Procedure Act (5 U.S.C. 1006, 1007, 1009). The complete text of these statutes is set forth in the jurisdictional statements in Nos. 642, 680 and 691.

Statement of the Case

A. *Background.*

On March 9, 1962, PRR and NYC filed their application for merger with the Interstate Commerce Commission. The basic justification presented by applicants for the merger as being consistent with the public interest was that current levels of traffic and income can no longer sustain the existing capacity of the rail systems in the East.

There are presently four major railroad systems in the East. These are (1) PRR, (2) NYC, (3) Chesapeake & Ohio-Baltimore & Ohio (C&O-B&O), and (4) Norfolk & Western (N&W). Each of these four major systems are about equal in freight revenues. In addition, there are a number of independent railroads not part of the four systems, such as Erie-Lackawanna (E-L), Delaware & Hudson (D&H), Boston & Maine (B&M), New Haven (NH), Central Railroad Company of New Jersey (CNJ), Reading (RDG), and Western Maryland Railway Company (WM).

Merger of PRR and NYC would upset the present balance between the four major systems, since PRR-NYC would then be twice as large as each of its two major competitors, C&O-B&O and N&W. The resulting three-system plan for the East has not been accepted by other railroads in the East. It would be lopsided in favor of PRR-NYC. E-L, D&H and B&M claim they cannot survive as independents under a three-system plan, so they seek inclusion in either the N&W system or in the merged PRR-NYC system. C&O and N&W seek to merge in order to have two major systems in the East of equal size. This latter merger has the general support of CNJ, RDG and WM because

they would otherwise remain as independents under a three-system plan, but is opposed by PRR and NYC.

The Commission considered in the past that four systems were desirable for the East. *Consolidation of Railroads*, 185 I.C.C. 403. Transportation scholars such as William Z. Ripley and Joseph B. Eastman recognized that the problem in the East was that the PRR and NYC were already too large, and that a restructuring of the railroad industry in the East required separation of the subsidiaries of these two systems and placing them under the control of other systems, *Consolidation of Railroads*, 63 I.C.C. 455, 488; 159 I.C.C. 522, 558-560.

Now that competitive balance has been obtained in the East—four major systems plus viable independents—PRR and NYC would upset the structure and plunge the railroad industry and the public into the same jockeying for position and intercine warfare that plagued the 1920s and 1930s. The problem today is the same as that which faced Messrs. Ripley and Eastman—PRR and NYC wish to retain the dominant power in the East.

The various merger proceedings of the 1960s were not consolidated by the Commission. Indeed, PRR consistently opposed consolidation. The rationale advanced for the PRR-NYC merger was that existing and foreseeable traffic levels do not warrant the maintenance of existing capacity. Ergo: A three-system plan for the East in lieu of a four-system plan.

The economic forecasts and projections for the future were made with the year 1961 being the last year for which complete statistical data was available. Applicants for the authority to merge forecast that combined PRR-NYC business would decline from 75.1 billion ton miles in 1960 and 72.6 billion ton miles in 1961 to lower levels of 69 billion in 1965 and 66 billion in 1970. Economist Leon H. Keyserling, testifying against the merger, projected the exact opposite—a rise in traffic from 72.6 billion ton miles in 1961 to 89 billion in 1965, and onward higher to 105 bil-

lion in 1970. (J.A., A8; B11, B13-B17, Charts 8, 10) The hearing examiners projected even lower than the applicants. Instead of 66 billion ton miles in 1970, they compute only 64 billion for that year. (327 I.C.C. 475, 559)

B. *The April 6, 1966 Report of the Commission.*

The April 6, 1966 report of the Commission adopted the projections of applicants and on that basis drew its unwarranted conclusion which even a few subsequent years of experience have shown it to be contrary to fact:

> "The examiners concluded that drastic relief was needed to arrest a trend which, over a period of time, could reduce the individual applicants to perilous straits." (327 I.C.C. 475, 496)
>
> "In view of their vulnerable and highly sensitive financial situation and their persistent incapacity to produce profits from rail operations—as we have found elsewhere in this report—we are convinced that applicants, if required to continue as independent lines, *could not keep pace with their common carrier obligations*, and neither they nor the public which depends upon them for service would benefit." (327 I.C.C. 475, 519 (emphasis supplied)

The report of the Commission, Appendix E, 327 I.C.C. 475, 559, adopted the forecast of the hearing examiners for 64 billion ton miles in 1970, but also included a higher 71 billion figure for the same year arrived at by considering the years 1964 and 1965.

The grievous error of the Commission, apparently unquestioned by the district court, is patently obvious from the actual facts of record. Instead of collapsing from 72.6 billion ton miles in 1961 to 69 billion in 1965, the continued traffic of PRR and NYC rose to 89.2 billion in 1965, *exactly as Mr. Keyserling projected in his testimony.* (J.A., D7-D8; Shapp pet., pp. 64-74)

Current levels of traffic for the two railroads indicate that the Keyserling goal of 105 billion ton miles in 1970

may very well be exceeded.

C. *The September 16, 1966 Report of the Commission.*

The September 16, 1966 report of the Commission, 328 I.C.C. 304, continues the doom-and-gloom philosophy underlying the proposed merger, despite its refutation by actual events. The Commission stated that applicants are not assured of continuous operations at the 1966 level, and:

> "To postpone consummation of the merger which we approved because there is at present a high level of economic activity gambles unnecessarily and unjustifiably with the future of these lines and their ability to render essential services." (328 I.C.C. 304, 311)

D. *Proceedings Before the District Court.*

The majority opinion of the district court stated that the operating savings had not lost their force because of the marked recent improvement in applicants' traffic and that the elimination of duplicate facilities would promote renovation of plant. Although accepting the savings to be brought about by the contraction of plant to conform with anticipated lower levels of traffic, the district court expressed no views as to whether the challenged economic forecasts of the Commission were consistent either with present reality or consistent with reasonable prospects for the next three years. (No. 642, J.S. A-19)

The majority opinion made the blanket statement, without any findings, that the complaint of Milton J. Shapp fails on all points required for an interlocutory injunction (No. 642, J.S. A-17). Further, that opinion states that the most important issues are questions of law which can be decided quite as well on preliminary as on final hearing, and that the sole significant legal issue is the propriety of consummation before certain protective conditions are completely determined. (No. 642, J.S. A-19, A-37)

It is apparent that the district court disregarded the presentation of Milton I. Shapp, as well as that of the Pennsylvania and New Jersey communities, other than to hold that these parties raise no important issues and fail on all of the requirements for an interlocutory injunction.

E. *Milton J. Shapp.*

Appellant Milton J. Shapp has been a Philadelphia businessman and is a citizen of the Commonwealth of Pennsylvania. He is also a PRR stockholder. A foe of the proposed merger since its inception, Milton J. Shapp participated actively in the Commission proceedings and before the district court.

The plan of merger is for a contraction of railroad facilities in the Commonwealth of Pennsylvania. Through freight traffic of PRR originating or terminating west of Youngstown and Columbus, Ohio, on the one hand, and north and east of Linden, N. J., on the other hand, will be diverted from the PRR main line through Pennsylvania to the so-called water-level route of NYC via New York State. For example, PRR traffic between Chicago and New York now handled via Pittsburgh-Harrisburg-Trenton would be moved via Buffalo-Syracuse-Albany over the tracks of NYC. (J.A., Shapp pet., pp. 2-4)

The proposed merger would eliminate one-third of the freight train miles performed over PRR. Communities such as Altoona, Harrisburg, Lancaster, Johnstown, Oil City, Titusville, Sharon, New Castle, Williamsport and Pittsburgh would lose from 18 to 73 percent of daily through freight service as now provided by PRR. (J.A., Shapp pet., p. 4)

The ports of Erie and Philadelphia will be seriously harmed by the merger. The Port of Erie would suffer because the merged system plans to use the NYC's lake port of Ashtabula, Ohio for the commerce of the Pittsburgh region. The Port of Philadelphia will be injured because the concentration of traffic over the NYC's route through

New York State which leads to the Port of New York would naturally give preference to that rival port to the detriment of the Port of Philadelphia. (J.A., Shapp pet., p. 5)

The merged system proposes a capital expenditure program of $74,696,000, but only $4,750,000, or less than 7 percent, would be spent in Pennsylvania. A huge new yard is to be constructed on the NYC at Selkirk, N. Y., near Albany, for classification of added traffic over NYC routes to New England and to the New York-New Jersey metropolitan areas. (J.A., Shapp pet., p. 4)

The eradication and diminution of PRR facilities in Pennsylvania, together with new capital expenditures in adjacent states, will be a tremendous handicap for the Commonwealth of Pennsylvania in its competition for new industry. Transportation capacity must precede economic growth. Industrial concerns appraise the availability of good competitive railroad service in determining the location of new plant sites or in the decision to expand or curtail existing facilities.

The PRR has heretofore been the lifeline by which Pennsylvanians have moved products into distant markets for over a century. The NYC has been the arch-competitor of the PRR and of the Pennsylvania businessman, since NYC is oriented to the Port of New York and traverses New York State whereas PRR has been oriented to the Port of Philadelphia via the Commonwealth of Pennsylvania. Merger of these two competitive railroads would place the surviving corporation in a gigantic conflict-of-interest situation.

This conflict-of-interest position plus the operational plans behind the PRR-NYC merger would result in placing the businessmen and citizens of Pennsylvania at a seriously disadvantageous position. The proposed merger of these two railroads has been appropriately described as the single most serious threat to the economy of Pennsylvania today.

ARGUMENT

Introduction and Summary

The three-judge district court, with one judge dissenting, concluded to deny various requests for an interlocutory injunction pending judicial review of the orders of the Interstate Commerce Commission authorizing the merger.

Although purporting to be guided by the four criteria governing issuance of an interlocutory injunction set forth in *Virginia Petroleum Jobbers Ass'n* v. *F.P.C.*, 259 F. 2d 921 (D.C. Cir. 1958), the district court said that the most important issues raised by the parties are questions of law which can be decided quite as well on preliminary as on final hearing. (No. 642, J.S. A-18, A-19). This is the primary and basic error of the district court because its duty on preliminary hearing was to make findings of fact and conclusions of law as to the propriety of an interlocutory injunction. As this Court stated in *Mayo* v. *Lakeland Highlands Can. Co.*, 309 U.S. 310, 316 (1940):

> "It is of the highest importance to a proper review of the action of a court in granting or refusing a preliminary injunction that there should be fair compliance with Rule 52(a) of the Rules of Civil Procedure."

On October 18, 1966, the Supreme Court in a per curiam opinion held that the district court had sustained the Commission's order authorizing the merger. Although the issue before the Supreme Court is the narrow one of whether the district court abused its discretion in denying an interlocutory injunction, in reality it turns upon the serious questions of (1) whether there are any substantial errors of law committed by the Commission, and (2) whether the pleadings in the district court raise substantial questions of fact requiring a detailed study of the administrative record for their solution.

It is the position of appellant that the court below erred in failing to recognize that the Commission had fundamentally erred as a matter of law in at least three im-

portant respects, each of which individually is sufficient in magnitude to require that its orders authorizing the merger be set aside or at least be remanded to the agency.

First, the Commission's reports are fundamentally premised upon estimates for the future collapse of traffic and earnings by PRR and NYC which on their face have been proven incorrect as a matter of law by data of record before the agency. In connection with the wholly erroneous and now-discredited economic forecasts for PRR and NYC, the estimated savings from the proposed merger have evaporated since these savings were based upon a reduction in capacity to conform with anticipated lower levels of traffic.

Second, the Commission's reports err as a matter of law in its construction of the fundamental test of the "public interest" for the purpose of Section 5(2) of the Interstate Commerce Act, because the Commission utilized the judicial construction of the "public interest" found in the Transportation Act of 1920 rather than in the 1940 legislation. In addition, particularly in its report on reconsideration, the Commission compounds its erroneous construction of the "public interest" by tacking on a broad and undefined "public benefits" test to its year 1920 standard. This "public benefits" test is prominent in the September 16, 1966 report on reconsideration.

Third, the Commission errs as a matter of law in rejecting the meaningful transportation criteria used over the years in evaluating competition between railroads for the purposes of Section 5 of the Interstate Commerce Act and Section 7 of the Clayton Act. In ruling as a matter of law that market competition between PRR and NYC is no longer a meaningful element of competition, the Commission fails to comply with the rulings of this Court in such recent decisions as *Minneapolis & St. Louis R. Co.* v. *United States*, 361 U.S. 173, 186 (1959) and *Seaboard Air Line R. Co.* v. *United States*, 382 U.S. 154 (1965).

This brief summarizes three legal arguments urged in the district court to set aside the Commission's orders.

Other important grounds for setting aside the Commission's orders are contained in the Joint Appendix to this brief. The points are presented to show the seriousness of the issues as advanced in the court below and that a final determination of those issues should result in the setting aside of the Commission's orders under review.

If appellant can prevail under these issues, it becomes obvious that there is irreparable harm to himself and to the public for whose interest he is acting, so that nothing further will need be said on that score.

I. THE ALLEGED FUNDAMENTAL JUSTIFICATION FOR THE PROPOSED MERGER HAS VANISHED.

The fundamental justification for the PRR-NYC merger is predicated upon a reduction in railroad plant capacity to conform with expected lower levels of traffic. This elimination of competitive capacity is, in turn, the basis for the claimed savings to be effectuated by the proposed merger.

A. *The Myth of an Economic Collapse for PRR and NYC.*

The application for merger was filed with the Interstate Commeroe Commission on March 9, 1962. The recovery of the national economy from the 1957-1958 business recession was the shortest in duration of the post-war business cycles, with the nation again in a recession during 1960-1961. But even the short period of prosperity between the 1957-1958 recession and the 1960-1961 recession had been marred for the eastern railroad industry because of the lengthy steel labor strike during 1959.

The application for merger was characterized by the I.C.C. hearing examiners in their report recommending that the Commission approve the merger as being founded upon disaster:

"By any known standard within our frame of reference, the proposal to merge applicants, in many re-

spects the two largest transportation entities in the United States, *cannot be viewed as anything less than a petition for extraordinary or drastic relief.* (Rec. Rep., p. 419) (emphasis supplied)

The examiners also concluded:

"We have found that *drastic* action is necessary if applicants and other railroads in the East are to continue to compete with other modes and to provide an adequate and efficient service to the public." (Rec. Rep., p. 426) (emphasis supplied)

"Adjudged by practically every significant indicia of economic health, the conclusion is clearly warranted that within the sense of the objectives contained in the National Transportation Policy, we are dealing here essentially with a "failing" industry and not simply with an isolated instance of corporate collapse or impotency." (Rec. Rep., pp. 400-01)

The examiners in their initial report projected that the combined freight traffic of PRR and NYC would decline from 72.6 billion revenue ton-miles in 1961 to 64 billion ton-miles in the year 1970. This projection was close to the forecast of the chief economic witness for applicants, Professor Ernest W. Williams of Columbia University. Witness Williams forecast that PRR-NYC ton-miles would decline to 69 billion ton-miles in 1965 and further drop to 66 billion in 1970.

The resulting necessity for a contraction of railroad capacity to conform with lower levels of traffic was vigorously challenged by Leon H. Keyserling, former chairman of the Council of Economic Advisers, whose projections were diametrically opposed to those of witness Williams. Rather than collapsing from 72.6 billion in 1961 down to 69 billion in 1965, and to an even lower level of 66 billion in 1970, witness Keyserling projected an increase in applicants' business from 72.6 billion ton-miles in 1961 up to 89 billion ton-miles in 1965, and onward higher to 105 billion in 1970. (J.A., B, Charts 8, 10)

The Commission in its April 6, 1966 report adopted the projections of disaster forecast by its hearing examiners and witness Williams, rejecting the views of witness Keyserling. The Commission stated its objective in approving the merger:

> "In approving the PRR-NYC merger it is our purpose to open the way for the development of a modernized railroad system trimmed of unnecessary plant, unencumbered by service obligations no longer responsive to the public needs, and free and able to grow as and where the Nation's transportation requirements dictate. Mergers are not for shrinkage any more than the pruning of a fruit tree is for reducing the yield of fruit.
> "The examiners concluded that drastic relief was needed to arrest a trend which, over a period of time, could reduce the individual applicants to perilous straits." (327 I.C.C. 475, 496)

The Commission also stated that it must be aware of the *probability* of economic imbalance and recession, and that its eyes cannot be closed *to the very real danger that our economy may not always be as active and healthy as it is today.* (327 I.C.C. 475, 497-98) (emphasis supplied)

The actual facts, however, had already completely refuted the economic forecasts of witness Williams and the hearing examiners. Rather than collapsing from 72.6 billion ton-miles in 1961 to 69 billion in 1965, combined PRR-NYC ton-miles rose to 89.2 billion in 1965 *exactly as witness Keyserling had projected.*

The Commission answered in its September 16, 1966 report on reconsideration that it was unwise to "gamble" on prosperity:

> "To postpone consummation of the merger which we approved because there is at present a high level of economic activity gambles unnecessarily and unjustifiably with the future of these lines and their ability to render essential services." (328 I.C.C. 304, 311)

The Commission continued the 64 billion ton-mile

estimate of its hearing examiners for 1970, which would be a 28 percent collapse from the 1965 level of traffic and, in addition, also projected 71 billion ton-miles for the same year by considering 1964 and 1965 data. (327 I.C.C. 475, 559) But either 64 or 71 billion ton-miles is far below the projection of witness Keyserling for 105 billion ton-miles in 1970, and witness Keyserling has been on target thus far.

The proposed merger is thus fundamentally predicated upon a precipitous decline in applicants' traffic from 89.2 billion ton-miles in 1965 to 64 or 71 billion three years from now.

Appellant Milton J. Shapp maintains that the scaling down of railroad capacity via merger to conform with such an anticipated collapse of traffic will very likely precipitate economic disaster. Transportation capacity must precede economic growth. If the so-called duplicating and excess capacity of PRR and NYC is scrapped, it will be thus impossible to attain the economic growth goals of the Nation and the economic requirements of the citizens of the Commonwealth of Pennsylvania.

The projections of witness Keyserling have been *proven* correct, and those of the Commission has been proven egregiously wrong. The difference between 105 billion ton-miles in 1970 (Keyserling) and 64 or 71 billion (Commission) for the same year is a difference of great magnitude. The 48 to 64 percent higher level of traffic projected by witness Keyserling for 1970 is consistent with his 30 percent higher level actually achieved in 1965 above that forecast by witness Williams.

The shockingly erroneous economic forecasts were characterized by Mr. Keyserling during his oral argument on October 21, 1965:

> "We would have to have a great economic calamity during the next five years to make realistic these projections on which the merger is founded, and such a calamity could run so counter to all of our national purposes and objectives that it would mean the ending

of the United States as a great power and a great power in world affairs." (J.A., Shapp pet., p. 70)

It is now only three years before 1970. The findings of the Commission are clearly perverse, arbitrary, capricious and devoid of a rational basis. Railroad capacity must be budgeted upward rather than downward. There appears to be no shortage of funds. Consolidated PRR-NYC earnings rose from $4.7 million in 1961 to $122.5 for the year 1965. (J.A., A10, fn. 2)

A mere remand from this Court to the Commission could not possibly cure the defect, because the merger itself is founded upon collapse. This is clear from the fact of the merger application itself, apart from the two reports of the Commission and the initial report of the hearing examiners. The section of the application for merger in which the applicants undertook to show that their merger would be consistent with the public interest included the following paragraph:

> "The economic benefits to be derived from the operation of the properties of the applicants as a combined system are essential to the continued operation of such properties in the public interest. Since World War II, the financial condition of the railroad industry has progressively deteriorated, and this situation has caused acute problems for the Eastern railroads, including the applicants. This reflects to a large extent the steady decline in the level of freight traffic handled by Eastern railroads, despite the economic growth of the territory served. The amount of operating income produced by Eastern rail freight service has also been substantially reduced. The current levels of traffic and income can no longer sustain the existing capacity of the rail systems in the East." (E-L Complaint, p. 10)

B. *The Projected Economies of the Merger Evaporate with the Erroneous Traffic Forecasts.*

The majority opinion of the district court, although

lengthy, makes no reference to the dismal traffic and financial forecasts for PRR and NYC that were given prominent attention by the Commission. The district court is silent on this feature, although urged in virtually all of the briefs filed by the respective plaintiffs.

The lower court did weigh heavily the estimated savings from the proposed merger. It stated that the estimated savings do not lose their force because of the marked recent improvement in applicants' earnings:

> "The Commission found, with ample supporting evidence, . . . that the resulting economies will redound in large part to the benefit of shippers, and thus to the general public, either through the improved service thereby made possible or lower rates. 327 I.C.C. 491. These considerations do not lose their force because of the marked recent improvement in applicants' earnings." (No. 642, J.S., A-19)

Other references are made to the estimated merger savings by the district court, the majority concluding that an interlocutory injunction would cause certain and substantial damage to PRR, NYC and the public. (No. 642, J.S., A-38)

The holding of the district court is erroneous. The basis for the claimed $80 million in annual savings after about eight years is fundamentally premised upon and is an integral part of the now-discredited traffic forecasts. It was because of claimed excess capacity on these two parallel railroads that economies were projected by the consolidation of facilities, filling out of low-tonnage trains with the combined traffic of the two carriers, reduction in the number of locomotives required, and other measures to reduce the competitive parallel capacity of PRR and NYC.

Since the gloomy traffic forecasts have been now refuted by actual experience, with a 22 percent *increase* in ton-miles from 1961 and 1965 rather than the 5 percent *decline* forecast by witness Williams for the same period, the savings of record have simply vanished.

The details of these savings were not set forth by the Commission in its report. Rather, resort must be had to the recommended report of the hearing examiners. Thus, in its only reference to the claimed $80 million in savings, the Commission states:

> "Applicants have shown that their annual savings from the merger will exceed $80 million after about 8 years. See pp. 131-155 of the initial report. (327 I.C.C. 475, 501)

The above referred-to pages from the examiners' report were also apparently adopted by the blanket endorsement of all facts in the examiners' report which were not modified or rejected by the Commission itself, plus the attachment of the examiners' report to that of the Commission in printed form in the permanent series of Interstate Commerce Commission volumes. (327 I.C.C. 475, 481-82)

Pages 131-155 of the initial report do not provide "ample supporting evidence" for the merger savings. The exact opposite is the correct posture of the estimated savings. This is because the fundamental theory of the savings is for a scale down of railroad capacity to conform with an expected lower level of traffic, thus achieving a higher rate of capacity utilization. There was to be a net reduction of 6,154,948 freight train miles (p. 132); retirement and modification of freight yards through more efficient utilization (p. 134-5); reduction in the locomotive fleet by the elimination of 306 diesel units and reduction in the expense of operating marine equipment at New York Harbor (p. 137); and consolidation of general and traffic expenses (p. 137-8). The examiners made the conclusion: (p. 140):

> "Continuously declining traffic levels over the past years have resulted in a reduction in plant for both applicants. Their application to merge is another step in that direction and one which applicants have shown will be fruitful of operating economies in the long run."

The 22 percent growth in freight traffic for PRR and NYC between 1961 and 1965 makes necessary a re-evaluation of the plan upon which savings were estimated, because capacity cannot be scrapped and freight trains discontinued with such an increase in business. One example is the estimated savings to be had by filling up lightly-loaded trains with the traffic of both railroads. This has already been achieved for PRR without merger. PRR ton-miles rose approximately 19 percent from 42 billion in 1961 to 50 billion in 1964, yet freight train miles were increased 6.5 percent from 27.8 million in 1961 to 29.6 million in 1964. The PRR was thus forced to run additional trains to handle the burgeoning business. (J.A., D12-D-13)

The reliability of the operating study was challenged by a witness from the Commission's own staff because the month selected for the study, October, 1961, was not deemed representative. The Commission itself rejected the month of October as representative for Eastern railroads in its decision in *Akron, C & Y.R. Co.* v. *Atchison, T. & S.F. Ry. Co.*, 321 I.C.C. 17, 31 (1963).

A reading of the very pages of the examiners' report cited by the Commission for estimated savings, pp. 131-155, clearly indicates that these savings are part and parcel of the operating plan for reducing the alleged excess capacity of the two carriers. These savings are no longer credible with the increase in traffic and, especially, with the realistic projections of Leon H. Keyserling for the year 1970.

II. THE DISTRICT COURT ADOPTED THE COMMISSION'S LEGAL ERRORS IN ITS CONSTRUCTION OF THE STATUTORY STANDARDS GOVERNING RAILROAD MERGERS

The district court concluded that the proposed merger, conditioned on inclusion of the New Haven Railroad, is in the public interest. (No. 642, J.S.A.-21-22) The opinion

below made no independent legal construction of the "public interest" requirement provided in section 5(2)(b) of the Interstate Commerce Act, so that it must be assumed that the district court adopted the lengthy discussion of the statutory standards contained in the April 6, 1966 report of the Commission. (327 I.C.C. 475, 494, 503-10, 520)

Appellant Milton J. Shapp vigorously disagreed with the Commission's construction of the applicable law. (Joint Appendix, Shapp pet. pp. 36-54.) In short, the Commission's interpretation of the "public interest" stopped with the Transportation Act of 1920, the agency holding that the four limited criteria of *New York Central Securities Corp.* v. *United States*, 287 U.S. 12, 25 (1932) are controlling. (327 I.C.C. 475, 494, 505.) The only new feature beyond *New York Central Securities Corp.* test used by the Commission to test the public interest in this proceeding is a vague "public benefits" factor heavily relied upon in its report on reconsideration.

The Commission's construction of "consistent with the public interest" is legally erroneous, requiring that its orders approving the merger be set aside and that the cause be remanded to the Commission for processing in accord with correct principles of law.

The legal errors of the Commission stem from its failure to recognize that *New York Central Securities Corp.* is predicated upon the more restricted transportation policy underlying the 1920 act, rather than upon the more expansive National Transportation Policy enacted in 1940 together with post-1940 legislation affecting transportation.

The transportation policy underlying Transportation Act of 1920 was constructed from its legislative history by Justice Brandeis in *New England Divisions Case*, 261 U.S. 184 (1923). It was this construction which was relied upon by the Court in *New York Central Securities Corp.* to hold

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*Followed in *Texas* v. *United States*, 292 U.S. 522, 531 (1934) and *United States* v. *Lowden*, 308 U.S. 225, 230 (1939).

that "public interest" related only to (1) adequacy of transportation service, (2) economy of service, (3) efficiency of service, and (4) appropriate provision and best use of transport facilities. (287 U.S. 12, 25).

The Emergency Railroad Transportation Act of 1933 amended certain of the railroad consolidation provisions. The 1933 legislative purpose broadened the overall transportation policy found in the 1920 Act. *Texas* v. *United States*, 292 U.S. 522, 530-33 (1934). *United States* v. *Lowden*, 308 U.S. 225, 230 (1939) followed this same definition of "public interest" that had been construed in *New York Central Securities Corp.*

Transportation Act of 1940 made substantial alterations in the carrier consolidation provisions of the Interstate Commerce Act and, more importantly, a National Transportation Policy was enacted which directed that all of the provisions of the Act were to be administered and enforced with a view to carrying out the new transportation policy. (49 U.S.C. preceding Section 1). The NTP is much broader and more comprehensive than the transportation policy found in the 1920 legislation. The NTP was construed to be the Commission's guide to the public interest in the first carrier consolidation case to reach the court subsequent to its enactment. *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 82 (1944). The Court traced the development of the "public interest" from the 1920 legislation through the 1933 and 1935 amendments to the Act. *McLean* held that the Interstate Commerce Act *and other legislation* dealing specifically with transportation problems constitute the immediate frame of reference within which the Commission operates, and the policies expressed therein will be the basic determinants of its action. *McLean*, supra, pp. 79-80. Legislation affecting transportation enacted subsequent to 1940 include Employment Act of 1946, Area Redevelopment Act of 1961, Manpower Development and Training Act of 1962, Economic

Opportunity Act of 1964, Appalachian Regional Development Act of 1965 and, of course, Transportation Act of 1958.*

The Legal Deficiencies in the Commission's Concept of the Public Interest

a. *The Specific Criteria of Section* 5(2)(c).

Section 5(2)(c) of the Interstate Commerce Act (49 U.S.C. section 5(2)(c) sets forth four criteria, among others, which must be given weight in passing upon any proposed transaction. One of these criteria states that the Commission, "shall give weight to . . . the interest of the carrier employees affected" (49 U.S.C. section 5(2)(c)(4)) This requirement of considering the interest of carrier employees affected in determining whether a merger should be approved is apart from the provisions of section 5(2)(f) confering benefits upon certain railroad employees.

The Commission in its April 6, 1966 report imposed protection for PRR and NYC employees pursuant to section 5(2)(f) and reserved jurisdiction over employees of carriers which may subsequently be included in the transaction. (327 I.C.C. 475, 543-46, 552) However, employees on railroads which the Commission finds will be adversely affected by the merger are neither awarded protection under section 5(2)(f), nor is their interest considered in passing upon the transaction as required by section 5(2)(c)(4).

In short, the Commission apparently considers section 5(2)(c)(4) as mere surplusage to section 5(2)(f). In its report of September 16, 1966 on reconsideration, the Commission states that the adverse effect upon employees of connecting carriers is not sufficiently related to the merger to warrant consideration. (328 I.C.C. 304, 313-14)

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*15 U.S.C. 1021; 42 U.S.C. 2501; 42 U.S.C. 2571; 42 U.S.C. 2701; 40 U.S.C. App. 2; 49 U.S.C. 13a.

Appellant Milton J. Shapp raised this error of law in his petition for reconsideration. (Joint Appendix, Shapp pet., pp. 55-56) The Commission now attempts to distinguish *Railway Labor Executives' Assn.* v. *United States*, 216 F. Supp. 101 (E.D. Va. 1963) so as to only apply in situations where the employees of the connecting railroad are actually performing work for the applicant carrier, even though technically on the payroll of another. (328 I.C.C. 304, 313) But such a distinction is not valid, for the Court interpreted the clear wording of the statute:

> "The Act does not, as the Commission would say, limit its security to employees of a carrier involved in the transaction. The guardianship is not dependent upon the role of their employers in the transaction. All 'employees affected' are under the aegis of the Act. The only question is whether they are 'affected': Are they touched sufficiently by the transaction?" (216 F. Supp. 101, 102)

The Commission finds that E-L, D&H and B&M will be adversely affected to a serious degree by the merger and has reopened the merger proceedings to determine whether additional protection is required. It is only proper that the adverse effect of the merger upon the employees of these carriers be considered by the Commission in passing upon the merger. The words of the statute are clear, apart from national legislation reflecting employment goals. In *Railway Labor Executives' Assn, et al.* v. *United States*, No. 640, Oct. Term 1966, now pending, the issue is presented as to whether section 5(2)(f) protection is to be accorded railroad employees of carriers who will suffer diversion as a result of the proposed merger of the Seaboard Air Line Railroad Company and Atlantic Coast Line Railroad Company. Until the September 16, 1966 report of the Commission in the PRR-NYC proceeding, however, it had always been assumed that railroad employment on carriers likely to suffer traffic diversion was to be consid-

ered in passing upon the transaction pursuant to section 5(2)(c)(4), just as is the diversionary impact on these affected carriers to be considered pursuant to section 5(2)(c)(1) and section 5(2)(c)(2).

The failure to consider railroad employment in determining whether the merger is in the public interest constitutes a major error of law. Railroad employment is an important factor in the economic welfare of many communities. The Congress has expressed special concern for railroad employment. *United States* v. *Lowden*, supra.

b. *The National Transportation Policy*

The proposed merger constitutes the largest railroad merger in U. S. history. The National Transportation Policy admonishes the Commission to develop and preserve a railroad system adequate to meet the needs of the postal service and of the national defense. The opinion of the district court stated that the Commission fully understood the national welfare and defense importance of the merger plan. (No. 642, J.S. A-38.)

However, a staff study* by the Commission's Bureau of Transport Economics and Statistics, dated the same month as the filing of the merger application, March 1962, warned:

> "2. *National defense*
>
> This standard is contained in the National Transportation Policy but apparently has not been considered separately as a specific public interest criterion in rail merger cases. There is some evidence of a growing amount of interest by members of the Congress in the affect of proposed railroad mergers on national security. The growing possibility of abandonment of duplicate track or facilities, the cutting back of certain rail services, the scrapping of older equipment in furtherance of merger plans, all highly desirable in terms of

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railroad economy, could be undesirable from a national defense and military preparedness standpoint. It might be beneficial in the public interest to set forth national defense as a criterion for separate evaluation in each consolidation proceeding."

The Commission itself, in June, 1962, ordered its Bureau of Inquiry and Compliance into the PRR-NYC merger case. Yet no request was made by that Bureau for defense or postal testimony from the responsible officials in the Department of Defense or in the Post Office. During the same period, however, the Bureau of Inquiry & Compliance did intervene in a rail-versus-water rate case to develop defense testimony concerning coastwise shipping. (Joint Appendix, Shapp pet., p. 48)

The Commission must be charged with the inadequacy of the record. It is difficult to imagine a proceeding with greater defense implications than the merger proposed herein. The operating plan underlying the merger would constitute a radical departure from the present flow of traffic, which has important defense implications.

The district court errs in crediting the Commission with an awareness of the national defense consequences of the merger, because the Commission admits that the record is devoid of probative testimony. As the Commission puts it:

> "This record has been challenged as according insufficient consideration to the postal service and national defense. By directive of the national transportation policy we are to administer the act so as to satisfy the transportation requirements of those two national activities. No official responsible for defense or mail has raised the question, however." (327 I.C.C. 475, 520)

The Commission has an affirmative duty to insure that the record is complete as to the relevant issues. *Pacific Inland Tariff Bureau* v. *United States*, 129 F. Supp. 472, 486; *Cantlay and Tanzola, Inc.* v. *United States*, 115 F. Supp.

72,81; *Scenic Hudson Preservation Conf.* v. *Federal Power Com'n*, 354 F. 2d, 608, 620.

The enactment of the National Transportation Policy in 1940 requires that national defense be considered as part of the public interest in consolidation proceedings. Although the defense implications in some smaller carrier unifications may be patently remote, if defense testimony is not to be solicited in the gigantic PRR-NYC proceedings, it can safely be said that it can be ignored altogether in other cases.

The error of the Commission and of the district court is particularly glaring in view of the fact that the agency directed one of its bureaus to participate in the case purportedly to develop the record. (Joint Appendix, Shapp pet., pp. 45-50.)

The decision in *McLean* affirmatively states that it is the National Transportation Policy which is the Commission's guide to the public interest. (321 U.S. 67, 82, 87.) This means that the Commission is required to consider national defense aspects to the merger and, if necessary, to solicit defense testimony in the same manner as it did on remand subsequent to *Interstate Commerce Commission* v. *New York, N.H. & H. R.R. Co.*, 372 U.S. 744 (1963).

c. *The "Public Benefits" Test*

The opinion of the district court states that the Commission's order binds the merged PRR-NYC to take over the operations of NH, and that this provision has the enthusiastic support of the four states served by NH. (No. 642, J.S. A-9) The district court further states that the provision compelling inclusion is strongly in the public interest. (No. 642, J.S. A-20)

The Commission itself gave great weight to the inclusion of NH in the transaction. Indeed, without inclusion of NH, the Commission found that the proposed merger would not be consistent with the public interest. (327 I.C.C. 475, 524)

Apart from the question whether the Commission's order actually contains an effective provision guaranteeing inclusion of NH in the transaction, a more serious matter is the adoption of a "public benefits" test by the Commission as its guide to the public interest and its legal rationale for inclusion of NH. It is by giving great weight to the difficult problems of NH that the merger was approved. This is particularly apparent from the concurring opinion of Commissioner Tucker, "Furthermore, in a balancing of the benefits and detriments of the present transaction, the New Haven Railroad problem must be given very substantial weight." (327 I.C.C. 475, 550)

The Commission's September 16, 1966 report on reconsideration makes extensive reference to the "public benefits" test. (328 I.C.C. 304, 306, 307, 310, 312)

The legal support for the "public benefits" test is given by the Commission as *Control of Central Pacific by Southern Pacific*, 76 I.C.C. 508, 516 (1923). (328 I.C.C. 475, 506) The alleged "public benefits" test is also claimed to derive from the opinions of the Supreme Court in *McLean* and *Minneapolis*. (327 I.C.C. 475, 507.)

Since inclusion of NH is the great "public benefit" without which the merger would be disapproved, a critical inquiry of the "public benefits" test is necessary. At the outset, it should be noted that the 1923 decision of the Commission in *Control of Central Pacific by Southern Pacific*, quoted at 327 I.C.C. 475, 506, did not adopt the "public benefits" test, but only speculated that such a test *might be* appropriate in a section 5(2) proceeding.

The opinions in *McLean* and *Minneapolis* lend no support to a broad "public benefits" test. The relevant language of *McLean*, followed in *Minneapolis* and in *Seaboard*, reads:

> "In short, the Commission must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved

> service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effectuating the over-all transportation policy." (321 U.S. at p. 87)

The difficulty with the "public benefits" test is that it is not tied down to transportation legislation or to over-all transportation policy as expressed by the Congress. The vague "public benefits" test was, in effect, condemned by the Supreme Court in *Texas* v. *United States*, 292 U.S. 522, 531, because the public interest as stated in section 5(2) is not a mere general reference to the public welfare.

The standard for the public interest expressed in *McLean* is specific. In addition to the criteria mentioned in section 5(2) itself, of which competition is one of the "among other" factors listed in section 5(2)(c), the "over-all transportation policy" specified in *McLean* relates to the National Transportation Policy and other legislation dealing with the transportation problems and facilities. The opinion in *McLean* states (321 U.S. at pp. 79-80):

> "The Commission's task is to enforce the Interstate Commerce Act and other legislation which deals specifically with transportation facilities and problems. That legislation constitutes the immediate frame of reference within which the Commission operates; and the policies expressed in it must be the basic determinants of its action."

Transportation Act of 1958* represents a firm Congressional policy that passenger service is not to be subsidized by the shippers of freight. The separate concurring opinion of Commissioner Murphy in *New York, N.H. & H. R. Co., Discontinuance of Trains*, 327 I.C.C. 151, 228, released simultaneously with the PRR-NYC merger decision, quotes the House report:

> "A major cause of the worsening railroad situation is the unsatisfactory passenger situation. Not only is the passenger end of the business not making money—it

*P.L. 85-625, 72 Stat. 571, August 12, 1958.

> is losing a substantial portion of that produced by freight operations * * * It is unreasonable to expect that such service should continue to be subsidized by the freight shippers throughout the country. H.R. Rep. No. 9222, 85th Congress, 2d Session. 11-12.

The Supreme Court construed significant portions of the 1958 passenger discontinuance law in *Southern R. Co.* v. *North Carolina*, 376 U.S. 93 (1964). The harsh views of Congress were noted and applied.

The *McLean* standards for construing the public interest would thus exclude NH as a proper consideration in approving the merger because Congress had declared in 1958 ("other legislation" in the words of *McLean*, at p. 79) that the shipping public is not to be burdened by the tremendous passenger deficits incurred on railroads such as the bankrupt NH.

There have been numerous attempts to repeal the 1958 passenger discontinuance law, but Congress has steadfast refused to budge.*

The Commission and the district court thus seriously err in imposing a "public benefit" test based upon a passing remark in a 1923 Commission decision and in the teeth of direct legislation by Congress that the alleged "benefit" is not to be considered a benefit for the purposes of overall transportation policy. Numerous passenger trains serving the Commonwealth of Pennsylvania have been discontinued pursuant to the 1958 legislation. Yet the citizens of the Commonwealth do not ask that New England shippers

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*For example, see: Hearings on *Train Discontinuances*–Before Senate Committee on Commerce, 88th Cong., 1st Sess. (1963); Hearings on *Amendments to the Transportation Act of 1958 (Train Discontinuance)*–Before Senate Committee on Interstate & Foreign Commerce, 86th Cong., 1st Sess. (1959); Hearings on *Proposed Passenger Train Act of 1960*–Before Senate Committee on Interstate & Foreign Commerce, 86th Cong., 2nd Sess. (1960); Hearings on *Passenger Train Service*–Before House Committee on Interstate & Foreign Commerce, 86th Cong., 2d Sess., (1960); Hearings on *The Crisis in Passenger Train Service*–Before Senate Committee on Commerce, 89th Cong., 1st Sess. (1965).

subsidize these trains through the medium of railroad unifications.

The substantial error of law committed in asking the citizens of states lying between the Mississippi and Hudson Rivers to subsidize the passenger operations in New England cannot be corrected by a remand to the Commission with instructions to evaluate the proposed merger apart from the New Haven Railroad inclusion. This would be an unnecessary step in as much as the Commission has already found that the proposed merger, without inclusion of NH, would not be consistent with the public interest. (327 I.C.C. 475, 524)

III. THE DISTRICT COURT AND THE COMMISSION FAILED TO GIVE DUE REGARD TO THE EFFECT OF THE MERGER UPON COMPETITION.

The majority opinion of the district court holds that the Commission's report fully complied with the directions of the Supreme Court in such recent decisions as *Minneapolis & St. Louis R. Co.* v. *United States*, 361 U.S. 173, 186 (1959), and *Seaboard Air Line R. Co.* v. *United States*, 382 U.S. 154 (1965) (No. 642, J.S. A-5, A-6)

The two cited references are to the accommodation of section 5(2) and the antitrust legislation, the Commission being obligated to estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed acquisition and consider them along with the advantages of improved service and other matters in the public interest to determine whether the acquisition will assist in effectuating the overall transportation policy.

The Commission erred, however, in its failure to actually estimate the scope and appraise the effects of the curtailment of competition. This failure of analysis results in a conclusion that the Commission, in approving the merger, was not properly apprised of the anti-competitive aspects of the proposed merger.

The Commission rejected the service market and product market criteria of *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962), relying upon *Seaboard Air Line R. Co.* v. *United States*, 382 U.S. 154 (1965). The Commission further states that it is not precluded from measuring the competitive consequences of a proposed rail merger by transportation standards which may or may not overlap the market criteria employed in antitrust cases. (327 I.C.C. 475, 507-09)

The basic error of the Commission stems from its refusal to apply meaningful transportation methodology in its analysis of transportation competition. The April 6, 1966 report confines its analysis of competition to *carrier* competition between PRR and NYC, plus a few vague remarks about product competition. (327 I.C.C. 475, 509-17) Completely overlooked is *market* competition between applicants. An example of market competition is the competition between PRR and NYC for the transportation of coal from mines served exclusively by each to a common consuming market. The report of the Commission restricts its analysis of intramodal competition to *carrier* competition at specific cities or between pairs of cities.

On reconsideration, the Commission notes the legal objections of appellant Milton J. Shapp to the failure of its report to consider market competition, but the Commission thereupon holds, as a matter of law, that the immunity conferred by section 5(11) now permits the Commission to evade the transportation criteria which it has traditionally used in appraising the curtailment of competition between railroads. 328 I.C.C. 304, 309.

The Commission cannot have it both ways. The agency cannot evade the service and product criteria of *Brown Shoe* on the theory that transportation criteria are more appropriate, and then claim that its power to confer antitrust immunity permits it to avoid meaningful transportation standards as well.

The distinction between *carrier* and *market* competition permeates the everyday work of the Commission. Applications for fourth section relief published in the *Federal Register* always specify whether the relief is sought on carrier or on market competition grounds.

The legal argument of the Commission is thus an extreme one. The three decisions cited by the Commission in its report on reconsideration hold that competition for the purposes of Section 5 of the Interstate Commerce Act and Section 7 of the Clayton *must* include market competition as well as carrier competition. *Directors of Wheeling & Lake Erie*, 138 I.C.C. 643, 649; *Interstate Commerce Commission* v. *Baltimore & O.R. Co.*, 152 I.C.C. 721, 723; *Interstate Commerce Commission* v. *Baltimore & O.R. Co.*, 160 I.C.C. 785, 789.* Yet the Commission now states that these cases technically arose under Section 20a and under Section 7 of the Clayton Act, rather than under Section 5(2), and thus need not be considered. (328 I.C.C. 304, 309)

The distinction of the Commission is artificial. It lacks a rational foundation. The Commission seems to say that if it were to institute an investigation to determine whether PRR had unlawfully acquired the power to control NYC, it would be required to analyze the competition between the two railroads in terms of market and carrier competition, but that because PRR has filed an application to acquire NYC, the agency need not make the same analysis of competition in accommodating section 7 of the Clayton Act with section 5(2) of the Interstate Commerce Act. (328 I.C.C. 304, 309)

Contrary to the Commission's present legal position, it has considered market competition in section 5(2) proceedings. *Buffalo, R. & P. Ry. Co. Control*, 158 I.C.C. 779, 784-85; *Control of Virginian Railway*, 117 I.C.C. 67, 73.

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*See also: *Interstate Commerce Commission* v. *Pennsylvania R. Co.*, 169 I.C.C. 618, 625, 626-27; *Chesapeake & O. Ry. Co. Purchase*, 271 I.C.C. 5, 23, 27.

The Supreme Court has held that the grant of antitrust immunity powers by Congress to the Commission leaves little doubt that the Commission is not to measure proposals by the standards of the antitrust laws. For otherwise the immunity would be meaningless since a violation of the antitrust laws would bind the hands of the Commission. But the confering of antitrust immunity does not relieve the Commission of its obligation to estimate the scope and appraise the effects of the curtailment of competition. This appraisal, using transportation criteria, is the same whether the proceeding arises via a formal section 5(2) application or by an investigation into unlawful control under section 7 of the Clayton Act. Meaningful criteria for measuring transportation competition must be employed in both instances.

Appellant suggests that the transportation criteria used over the years to evaluate competition between railroads is appropriate and practical. These criteria recognize the realities of railroad competition as consisting of both carrier and market competition. If anything, market competition is the more important of the two because most shippers are captive to one railroad, particularly in the mining and agricultural industries, where market competition is the real competition.* The Commission thus errs as a matter of law in confining its meaningful analysis to direct carrier competition.

Apart from its refusal to honor the transportation criteria employed over the years in evaluating railroad competition, the Commission further states that the law and the agency itself stand as a continuous bar to any perversion of economic power gained by the merger. But this statement is likewise erroneous as a matter of law because there is a wide zone of reasonableness in ratemaking within which the Commission is powerless. *United States* v. *Chi-*

*A number of market competition cases have reached the Supreme Court. For example, *Intermountain Rate Cases*, 234 U.S. 476, 483 (1914); *U.S.* v. *Chicago, M. St. P. & R. R. Co.*, 294 U.S. 499 (1935).

cago, M. St. P. & P.R. Co., 294 U.S. 499, 506 (1935); *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 460-61 (1945).

The Commission also errs in its refusal to consider the interlocking directorates, reciprocity in purchasing and routing, and combined buying power. (328 I.C.C. 304, 310) Again, the error is of law, since a violation of the Clayton Act is not the sole determinant of anti-competitive behavior. *Seaboard*, supra. The Commission cannot properly ignore these anti-competitive matters, but must consider them in evaluating whether the merger is in the public interest. The refusal of the Commission to consider these phases of competition in passing upon the transaction, despite substantial and unrefuted evidence,* is an error of law of great magnitude. (Joint Appendix, Shapp pet., pp. 52-54)

IV. OTHER SUBSTANTIAL ISSUES ARE PRESENT WHICH REQUIRE AN INTERLOCUTORY INJUNCTION

Appellant has shown that on three basic issues the Commission's orders approving the merger could be set aside as a matter of law. There are, however, other issues of substance which require a hearing on the merits in the District Court, and which necessitate an interlocutory injunction so as not to render moot a decision in favor of plaintiff on the merits.

A. *New Haven Railroad.* Approval of the merger is contingent upon inclusion of N.H., and without such inclusion the merger would fail of approval. (327 I.C.C. 475, 524) Although the merged company is obligated to include N.H. on terms yet to be determined, there is no corresponding obligation on the part of the N.H. trustees to merge the bankrupt carrier into PRR-NYC. Complex problems are in-

*See: Fixler, L.D., *Interlocking Directorates and Railroad Mergers*, Illinois Quarterly Review of Economics, Vol. 5, No. 1, Spring 1965.

volved under Section 77 of the Bankruptcy Act as the Commission itself is aware. (327 I.C.C. 475, 525)

The Commission on November 14, 1966 ordered hearings relative to inclusion of N.H. to commence January 16, 1967. In view of the disagreement between the Trustees and various security holders on important matters, it is speculative at this time whether inclusion of N.H. into PRR-NYC will be the form in which N.H. will eventually emerge.

Since inclusion of N.H. is a prerequisite to the merger being found consistent with the public interest, the uncertainty that N.H. will ever be included compels issuance of an interlocutory injunction until the fate of N.H. is determined.

The terms for any inclusion of N.H. are important to citizens of Pennsylvania since the burden to be assumed by the merged carrier, and thus indirectly by shippers and the public, is unknown at this time.

B. *Traffic Conditions.* Appendix A to the Commission's report of April 6, 1966 provides for the suspension of rates and routes participated in by the merged PRR-NYC which would divert or tend to divert traffic from routes participated in by E-L, D&H or B&M. (327 I.C.C. 475, 561-63) The suspension is automatic if E-L, D&H or B&M was participating in the particular route, rate or service and was handling traffic thereon, even though a new or changed PRR-NYC rate is within the zone of reasonableness and otherwise lawful under the Interstate Commerce Act.

The petition of Milton J. Shapp for reconsideration challenged the legality of this deprivation of competition within the zone of reasonableness which is of benefit to the public, particularly in the absence of any hearings or notice to the public. (Joint Appendix, Shapp pet., pp. 21-24) The Commission answers that legality of the Appendix G conditions under other portions of the Act or by other legislation is not the test. The sole test is claimed to be whether

the terms are just and reasonable under Section 5(2)(b). (328 I.C.C. 304, 326)

The Appendix G conditions are novel. The construction of Section 5(2)(b) made by the Commission is that it may do anything it pleases in a carrier unification proceeding despite the strong Congressional intent that independent rate action is not to be discouraged, which was manifested by the 1948 Reed-Bulwinkle amendment. Indeed, it was the imposition of the "independent action" proviso of Section 5a that played an important part in the 1948 legislation. Although Appendix G is not an "agreement" between railroads, the practical effect of the anti-competitive rate suspension provisions is to give E-L, D&H and B&M a veto in the rate conferences. Most important, the anti-competitive effect of Appendix G was only considered as a protective device for three carriers rather than evaluated along with other matters in the public interest as required by *McLean* and *Minneapolis*.

The suspension provision of Appendix G raise important issues as to the power of the Commission, requiring an interlocutory injunction pending their resolution.

C. *Consolidation with Other Proceedings.*

The District Court states that consolidation of the PRR-NYC merger proceeding with the N&W inclusion case (F.D. 21510) and the N&W-C&O merger case (F.D. 23832) rests in the sound judgment of the Commission subject only to its management of the various proceedings so as to promote an ultimate solution fair to the carriers and consistent with the public interest. (No. 642, J.S., A-17)

The Commission has declined to consolidate various railroad unification proceedings. Nevertheless, it takes official notice of the N&W inclusion case and the N&W-C&O merger case, affirmatively states that these events have a bearing on its decision in the PRR-NYC merger case, and then invites any party to proceed pursuant to Section

7(d) of the Administrative Procedure Act. (327 I.C.C. 475, 487)

Appellant Milton J. Shapp petitioned for a further hearing in accordance with the Commission's invitation. (Joint Appendix, Shapp pet., pp. 19-21) This was denied, by the September 16, 1966 report. (328 I.C.C. 304, 307)

A very unusual situation is presented: The Commission relies upon contemporary railroad unification proceedings in approving the instant merger, yet fails to consolidate the PRR-NYC merger case with these other proceedings. Most important, and the basis for the further hearing sought by Milton J. Shapp, is the fact that the N&W inclusion case and the N&W-C&O merger case arise *solely* because of the proposed PRR-NYC merger. The Commission is obliged to consider the natural consequences of its approval of the PRR-NYC merger and to evaluate such additional anti-competitive effects.

The serious nature of the Commission's error can be appreciated from the majority opinion of the District Court:

> "Although the Commission's duty to avoid prejudgment prevented it from saying so, no great clairvoyance is needed to predict the likelihood of its finding that the public interest is consistent with inclusion of the three roads on proper conditions in the N&W system. . . . With hearings on inclusion in the N&W already ended, a final determination in 1967 should surely be feasible; and the Commission has power to fix terms binding on N&W." (No. 642, J.S. A-10, fn. 4)

Appellant suggests that the District Court may have correctly read between the lines of the Commission's report, and that the Commission may have, in fact, prejudged the N&W inclusion case without "clairvoyance." This being apparent to two disinterested judges, coupled with the positive statement of the Commission that the N&W inclusion case has a bearing on its action in approving the PRR-NYC merger, it is clear that the Commission should have

either consolidated the inclusion case with the PRR-NYC merger proceeding or else make requisite findings in the PRR-NYC case concerning the competition to be curtailed if inclusion is ordered in the reopened N&W case. The failure of the Commission's findings in the PRR-NYC case in this regard are fatal since an appraisal of the competition expected to be curtailed must be made in accordance with the directions of the Supreme Court in *McLean* and *Minneapolis*.

This is an important and substantial issue requiring an interlocutory injunction.

D. *Judicial Review.*

The majority opinion of the District Court devotes considerable attention to the question whether denial of an interlocutory injunction would impair the right of certain plaintiffs to effective review of the Commission's orders. (No. 642, J.S. A-33-39) However, the district court only considered the right of judicial review for the 10 intervening railroad plaintiffs. Completely omitted was any discussion of the right to judicial review possessed by the 8 intervening Pennsylvania and New Jersey communities and Milton J. Shapp.

The statutory scheme as embodied in the Interstate Commerce Act, Administrative Procedure Act, and the three-judge court provisions of Title 28, Sections 2281-2284 and Sections 2321-2325 contemplates that in the course of orderly procedure there may be judicial review of Interstate Commerce Commission orders. *Florida East Coast Railway Company* v. *United States*, 228 F. Supp. 340 (M.D. Fla. 1964)

The federal courts regularly enjoin railroad mergers pending judicial review of the Commission's orders. The action of the District Court in the PRR-NYC merger case is virtually without precedent.

There is a special reason for a full review of the Commission action herein that does not exist in most actions to

set aside railroad mergers. This is the substantial opposition from many communities. The release of the Commission's report on reconsideration in Washington, D. C. only 48 hours before the hearing in the District Court which had been scheduled well in advance for September 21, 1966, effectively precluded many communities from participation in the proceedings below. Nevertheless, the hearings before the regulatory agency show substantial opposition to the merger by individuals and by communities. This is demonstrated in the report of the hearing examiners, attached as an appendix to the April 6, 1966 report. (Rec. Rep., pp. 10-14; 229-280).

The proposed merger of PRR and NYC, which, if consummated, would be the largest merger in U.S. corporate history, merits judicial review. Serious questions of fact and law are involved, the resolution of which will have a profound influence upon industrial location, taxation, the growth or decline of particular communities, and the enjoyment of railroad competition.

Conclusion

The judgment should be reversed, and the case remanded with directions to grant an interlocutory injunction until final hearing or to set aside the Commission's orders under review.

Respectfully submitted,

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